



[2020] JMSC Civ 51

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. 2008HCV00937**

|                |  |                  |
|----------------|--|------------------|
| <b>BETWEEN</b> | <b>CECIL PERKINS</b>                   | <b>CLAIMANT</b>  |
| <b>AND</b>     | <b>THE ATTORNEY GENERAL OF JAMAICA</b> | <b>DEFENDANT</b> |

**CONSOLIDATED WITH:**

**CLAIM NO. 2008HCV00750**

|                |  |                                 |
|----------------|--|---------------------------------|
| <b>BETWEEN</b> | <b>CHARMAINE ROACH</b>                 | <b>CLAIMANT</b>                 |
| <b>AND</b>     | <b>ERIC DRYDEN</b>                     | <b>1<sup>ST</sup> DEFENDANT</b> |
| <b>AND</b>     | <b>THE ATTORNEY GENERAL OF JAMAICA</b> | <b>2<sup>ND</sup> DEFENDANT</b> |

Sean Kinghorn instructed by Kinghorn and Kinghorn for both claimants

Dale Austen and Ms. Cheryl-Lee Bolton for the defendants

*Motor vehicle accident involving two separate collisions – Statutory and common law duty of care owed by each driver to other users of the road – Whether one or more that one driver liable for accident – Whether any contributory negligence arises*

**January 29, 2015 and April 3, 2020**

**D. FRASER J**

**INTRODUCTION**

[1] These are consolidated claims in which the respective claimants, Cecil Perkins and Charmaine Roache, seek damages for injuries and loss they suffered in a motor vehicle collision on March 19, 2006 along the Twickenham Park main road in St. Catherine. Their cause of action is in negligence and they allege that Mr.

Dryden, the 1<sup>st</sup> defendant and servant of the Ministry of Health, negligently drove an ambulance and caused a collision with Mr. Perkins' taxi in which Ms. Roach was a passenger. The claimants allege that the Attorney General of Jamaica, the 2<sup>nd</sup> defendant is vicariously liable for their loss pursuant to the provisions of the Crown Proceedings Act.

- [2] The Attorney General has resisted the consolidated claims, denying that Mr. Dryden was negligent. The Defense is that the collision between the vehicles was due to the negligence of Cecil Perkins who suddenly turned his vehicle to the right into the path of the overtaking ambulance, resulting in the collision.

### **THE EVIDENCE**

- [3] Mr. Cecil Perkins, a 51-year-old taxi operator of nineteen (19) years, stated that at around 5 pm on May 19, 2006 he was driving his Daihatsu motor vehicle registered PC 0447 ("the taxi") with three (3) passengers travelling towards Kingston. Among them was Charmaine Roach, whom he knew before from his community. She sat in the front passenger seat. He said he was in the left lane along Twickenham Park Main road in St. Catherine heading towards Kingston on a section of the road that accommodates single lane traffic in each direction. The road at that section was straight, dry and asphalted, Mr. Perkins noted, that though the sun was going down, the day was still bright enough for him to see clearly through his windscreen.

- [4] He said he decided to get some gasoline at the Petcom Gas station near to Carreras Ltd. on the right, and activated his indicator to turn right about 30 feet from the turn. He decelerated and positioned the vehicle close to the middle of the road, in preparation to make the turn. He said he also looked ahead of him for oncoming traffic and checked his rear view mirror for any vehicle coming from behind him, but saw no vehicles coming in either direction.

After taking those preliminary steps, Mr Perkins said that as he started to turn, he heard the loud screeching of brakes, looked and saw the ambulance and tried to

straighten his vehicle. The ambulance then collided with the right rear section of the taxi. Another vehicle then hit the taxi after the ambulance. Mr Perkins stated that he did not hear the sound of a siren, neither did he see flashing lights from the ambulance. Mr. Perkins said he observed damage to the front left of the ambulance and that it came to rest in the right hand lane. The back glass of the taxi was shattered, the back was damaged and its rear doors could not be opened due to the damage. As a result the taxi had to be wrecked from the scene at a fee.

- [5] Though the taxi was licensed as a route taxi, Mr. Perkins admitted that he was operating a charter on the day of the accident. He said on his way to Kingston he recognised that he would need some fuel to complete the charter. He rejected the suggestion that he suddenly turned right when he got to the gas station. He insisted that had activated his indicator from the vicinity of a pedestrian crossing about 40 feet from the gas station, before turning right.
- [6] Also in cross-examination, although Mr. Perkins gave evidence that the road was busy that day, he insisted that he did not see any vehicle behind him or in front of him as he was about to turn into the gas station. He said he did not hear an “alarm” [*sic*] (siren) behind him and that he had not fully turned to the right when he heard the sound of the tires screeching behind him. In fact, according to Mr. Perkins, he was just to the right of his left lane, such that only his right tire was touching the centre dividing line. Mr. Perkins rejected the suggestion that he had been speeding at the time just prior to the collision and stated that he had been travelling at the pedestrian pace of 5 km per hour. Though he could see up to 30 feet behind him through his rear view mirror, he did not see the ambulance prior to turning and did not see it until the moment he heard the brakes behind him.
- [7] Charmaine Roach gave evidence that she was travelling in the front passenger seat of the taxi when the accident occurred. She said Mr. Perkins was driving at a modest speed and turned on his indicator to turn right into the gas station. She recounted that as he was about to turn into the gas station, the taxi was struck

from the rear by the ambulance travelling in the same direction as they were. The taxi got out of control and spun in the road causing another vehicle travelling in the same direction as the taxi to collide with it.

- [8]** Ms Roach in cross-examination stated that her daughter and her daughter's schoolmate were also in the vehicle. She indicated further that she knew Mr Perkins from his operating his taxi on that route for years, and that she often travelled with him. She said that at the time of the accident the taxi was in total silence as there was no conversation going on and neither was the radio playing. She claimed that she observed when Mr. Perkins checked his rear view mirror about 28 feet before the turn for the gas station and that she had seen him check it several times during the journey. According to her, Mr. Perkins had slowed down and was in the middle of the road about to turn when she felt the impact to the right side of the vehicle. The impact pushed her forward in the seatbelt and she reached for her daughter who was thrown from her seat.
- [9]** Seconds afterwards, the taxi was hit by a second vehicle and then continued into a gully where it came to rest. She said she did not see flashing lights from the ambulance prior to the first collision which she maintained was what pushed the taxi into the gully, despite the fact of the second collision. Ms Roach stated the ambulance did turn on a flasher but that this was done after the collision when the taxi was in the ditch. She rejected any suggestion that the ambulance had its flashing lights on before the collision.
- [10]** Mr. Eric Dryden was unfortunately unavailable to give evidence at trial due to his death. However, his statement was tendered into evidence. In that statement Mr. Dryden outlined that on March 19, 2006 he was the driver of an ambulance for the Spanish Town hospital accompanied by two (2) attendants and a nurse. He was at the time transporting patients to the Bustamante children's hospital and to the University Hospital of the West Indies. He said that he was travelling along the Twickenham Park Main Road from the Spanish Town direction, heading towards Kingston in good day light, on a dry asphalted road surface.

**[11]** Mr. Dryden said that he was travelling at about 40 mph with his flashing lights on when he reached the vicinity of the Petcom Gas station and saw the red Daihatsu motor car, travelling in the same direction. He decided to overtake the taxi when it suddenly and without any indication, turned to the right to enter the gas station. Mr. Dryden said that he swerved further right to avoid a collision with the taxi but that the ambulance collided with the front right side of the taxi. When the taxi stopped, he heard an impact behind him and realised that a Toyota station wagon registered 0499 BZ ("the station wagon) that was travelling behind the ambulance with the parents of one of the children in the ambulance, collided with the rear of the taxi, pushing it off the road.

**[12]** He parked the ambulance in front of the gas station and after seeing that none of the passengers in his vehicle was injured, made observations of the ambulance. Its left headlight was broken, left door and bumper damaged, and the radiator was leaking radiator fluid. The taxi had come to a stop further along the road on the left side, inside a ditch. However the court observed that he made no mention of its condition in the witness statement. The station wagon had its front damaged and its windscreen broken.

#### **THE ISSUES**

**[13]** The primary factual and legal issues for the court to determine are:

- i) Did Mr. Dryden negligently cause or contribute to the collision, thereby making the Crown vicariously liable for the damage and loss suffered?
- ii) Did Mr. Perkins negligently cause or contribute to the collision?
- iii) If Mr. Perkins was contributorily negligent, in what proportion?
- iv) If Mr. Dryden bears liability in whatever proportion, should there be any apportionment of liability with respect to the driver involved in the second collision?

- v) If Mr. Dryden bears liability in whatever proportion, what measure of damages is due to the claimants?

#### THE SUBMISSIONS ON LIABILITY

##### *Counsel for the claimants*

- [14] Counsel for the claimants submitted that the defendants have presented conflicting positions as to how the accident occurred. One position, counsel submitted, was as stated in the Defence filed on June 19, 2008 in Claim no. 2008 HCV00937 and the witness statement of Mr Dryden in which the ambulance was said to be travelling in the left lane behind the taxi when it proceeded to overtake the taxi resulting in the collision. However counsel contended that a contrary position was stated in another Defence filed on August 21, 2008 in Claim no. 2008HCV00750 in which the ambulance was said to be travelling in the right lane and the taxi in the left lane and whilst the ambulance overtook the taxi, the taxi suddenly turned right into the path of the ambulance.
- [15] The claimant's position is that at all relevant times the taxi was on the left side of the road and that the ambulance collided with the "right back" section of the taxi, as it attempted to turn right into the gas station. Counsel highlighted that the Damage Assessment Report only showed damage to the rear section of the taxi and not to the front right side.
- [16] Counsel relied on s. 51 of the **Road Traffic Act (RTA)**. Counsel also cited the cases of ***Jowayne Clarke and Anthony Clarke v Daniel Jenkins*** Claim no. CL 2001/C211 jud. del. October 15, 2010 which outlined the common law position in relation to the duty of drivers on the road; ***Pamela Thompson, Horace Huggins, Muret Forrester, Venetia Hudson, Tanya Scott, Junior Robinson, and Kevin Walker v Devon Barrows, Henry Kennedy and Errol Reid*** Claim no. CL 2001/T143 in which the statutory duty placed on drivers by the Road Traffic Act was considered; ***Cecil Brown v Judith Green and Ideal Car Rental*** Claim No. 2006/HCV 02566 jud. del. October 11, 2011 and ***Jehoida Buchanan v Adrian***

***Smith and Phyllis Hinds*** Claim No. 2010 HCV 04702 jud. del. September 16, 2013 which both addressed the overlap between the common law and statutory duties placed on motorists on the road; and ***Nance v British Columbia Electric NY*** [1951] AC 601 which was cited in ***Jehoida Buchanan v Adrian Smith and Phyllis Hinds***.

- [17] Counsel submitted that based on the defence case, Mr. Dryden could not escape liability for the collision even if the court accepted the case presented on his behalf as i) the agreed point of impact was to the rear of the taxi as evidenced by the agreed Motor Damage Assessment Report and ii) the defence failed to provide evidence that Mr. Dryden complied with his duty under section 51(2) of the **RTA** to take reasonable steps to avoid the collision. Counsel submitted that the point of impact on the taxi was germane to determining which of the two competing versions was true, and that it corroborated the claimant Perkins' account rather than the account of Mr. Dryden. This in a context where no evidence was presented by the defendants to show that Mr. Dryden complied with his duty under section 51 (2) to take all reasonable steps to avoid the collision; and also where both claimants were subjected to vigorous cross-examination and remained unshaken.
- [18] Regarding the issue of contributory negligence counsel for the claimants posited that a person is liable for contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might be hurt himself, and in his reckonings he must take into account the possibilities of others being careless. Counsel advanced that it was for the defendants to prove negligence on the part of the claimant which was a question of fact (See ***Flower v Ebbw Vale Steel, Iron and Coal Co. Ltd.*** [1936] A.C. 206). Counsel however argued that despite alleging that Mr. Perkins had been negligent in the pleadings the defendants had not provided any evidence in support of such negligence which was fatal to the defendants' case (See ***Ramon Burton (an infant by his father and next friend Wilburn Barton) and Wilburn Barton v John McAdam,***

**Wesley McAdam, Lawrence Dennis and Dennis Clinton Wright** Claim no. CL 1996 B 110 jud. del. May 24, 2005).

- [19] Regarding the effect of the second collision on the issue of liability, counsel for the claimant submitted that the drivers of both vehicles which collided with the taxi would be joint tortfeasors and accordingly, if the court found Mr. Dryden liable, whether partially or in full, he would be liable to the claimant for the entire loss, subject to any contributory negligence on the part of the claimant, which as submitted earlier was not made out by the defendants. Therefore, counsel argued that it was an irrelevant consideration that the claimant's injuries were jointly caused by the drivers of the ambulance and the station wagon, as long as Mr. Dryden, as a tortfeasor, was before the court (See **Ann Lutas v Lilieth Hanson and Rohan Baker** Claim no. 2003 HCV0563 in which the Court of Appeal decision in **The Attorney General v Evelyn Simpson, Joseph Thorpe, Derrick Russell and Estate Ernest Clarke** SCCA 119/04 (jud. del. June 22, 2007) was cited with approval).

*Counsel for the defendants*

- [20] Counsel for the Attorney General submitted that the defence did not have two inconsistent positions on the collision. Counsel advanced that the consistent position has been that the taxi negligently suddenly made a right turn into the path of the ambulance causing the collision. Counsel however acknowledged that while there was only evidence of damage to the rear of the taxi, Mr. Dryden's witness statement stated that the collision with the taxi was to the front right side, but that the station wagon hit it from the rear.
- [21] Counsel relied on the ingredients of negligence as laid down in the *locus classicus* case of **Donoghue v Stevenson** [1932] A.C. 562. Counsel advanced that the driver of the taxi would be exposed to liability where the negligence alleged may be reasonably inferred from acts which make it more probable than not that the damage alleged was caused by his negligence as opposed to some



other cause. Counsel submitted that emerging from the objective standard of the general duty of care owed by motorists to each other, was the obligation of motorists to keep a good look out for other traffic, that was or which may be expected to be on the road (See *Nettleship v Weston* [1971] 2 QB 691). Counsel also relied on *Hay (or Bourhill) v Young* [1943] A.C. 92 which outlined that motorists when driving should exercise reasonable care, that is the care that an ordinary skilful driver would have exercised under all the circumstances. Reasonable care counsel argued, would include the duty of the motorist to keep a proper look out for traffic in front of, behind and alongside him (See *Springett v. Ball* [1865] 4 F&F 472).

- [22] Counsel also pointed to section 57 (1) of the **RTA** and Regulation 12 of the Island Traffic Authority Road Code, 1987 which outline the responsibility of drivers to give appropriate signals of their intention to turn. Counsel noted that while the failure to observe any provision of the Road Code does not render that person liable to civil or criminal proceedings, where there are proceedings in being any such failure may tend to establish or negate any liability which is in question in those proceedings. Counsel accordingly submitted that in the event that Mr. Dryden's evidence of an absence of liability on his part was preferred by this court, the application of these principles of law to the relevant facts would yield a finding in favour of the Crown.
- [23] Counsel invited the court to view with scepticism and reject the evidence of Mr. Perkins to the effect that he gave adequate indication of his intention to turn and kept an adequate lookout, though he failed to see any traffic coming in either direction in what was known to be a busy thoroughfare, and that he took care to turn safely.
- [24] Counsel submitted that the fact that after the first collision the ambulance was able to stop and park neatly against the sidewalk and the taxi then stopped presumably in the roadway, suggested that it was not a very serious collision. Counsel contended this was also evidenced by the fact that the exhibit pictures

disclose very little, if any, evidence of impact marks at "the front right side of the red Daihatsu" – where the statement of Mr. Dryden outlined that the ambulance collided with the taxi. Counsel argued that it was the second collision involving the station wagon that collided into the rear of the taxi, pushing it off the roadway and into a ditch that ran alongside the roadway, which resulted in more damage. In the circumstances, it was submitted, that in any event the damage and losses being claimed by the respective claimants were to be traced to this second collision and not the first one involving the ambulance.

**[25]** Counsel submitted that in addition to the general duty of care to keep a good lookout for traffic, to avoid excessive speed, to observe the traffic rules and signals, and to make no errors of judgment, Mr. Perkins was also prohibited from making turns in the way that he sought to do. Thus, counsel contended, there was the inescapable conclusion that Mr. Perkins was negligent and on a balance of probabilities triggered the sequence of events that caused the accident which led to the injuries, loss and damage suffered by the claimants.

#### **THE LAW**

**[26]** Section 51 (1), (2) and (3) of the **RTA** provide as follows:

(1) The driver of a motor vehicle shall observe the following rules – a motor vehicle

(a) meeting or being overtaken by other traffic shall be kept to the near side of the road. When overtaking other traffic the vehicle shall be kept on the right or off-side of such other traffic:

...

(b) being overtaken by other traffic shall be driven so as to allow such other traffic to pass;

(c) shall not be driven alongside of, or overlapping, or so as to overtake other traffic proceeding in the same direction if by so doing it obstructs any traffic proceeding in the opposite direction;

...

(g) shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead;

...

(2) Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.

(3) For the purposes of this section -

(a) ...

(c) "overtaking" includes passing or intending to pass any other vehicle proceeding in the same direction.

[27] Section 57 (1) of the **RTA** provides:

The driver of a motor vehicle constructed to be steered on the right or off-side thereof, shall, before commencing to turn to, or change direction towards, the right, give the appropriate signal so as to indicate that direction.

[28] Regulation 12 of the Island Traffic Authority Road Code 1987 states, "*Decide on the place you want to turn and signal your intention to do so to other road users well in advance of your turn.*"

[29] The **RTA** and supporting regulations however have to be interpreted in light of the body of common law that has developed over many years refining the tort of negligence and applying it to various situations, involving the driving of motor vehicles on roads.

[30] The general principles of negligence emanating from ***Donoghue v Stevenson*** are too well known to require repetition here. Those general principles applied in the context of motorists driving on the road were outlined in the case of ***Nettleship v Weston*** in which a driving instructor sued his student for injuries suffered in an accident when she was in control of the vehicle. Rejecting an

argument that the standard of care should be lower because the student was inexperienced, it was held by a majority that the duty of care owed by the learner driver to the passenger instructor was the same objective and impersonal standard as that owed by every driver, including the learner, to passengers, the public and property on and off the highway in the criminal and civil law. At page 699 Lord Denning MR writing as a part of the majority said:

The learner driver may be doing his best, but his incompetent best is not good enough. He must drive in as good a manner as a driver of skill, experience and care, who is sound in wind and limb, who makes no errors of judgment, has good eyesight and hearing, and is free from any infirmity: see *Richley (Henderson) v. Faull. Richley, Third Party* [1965] 1 W.L.R. 1454 and *Watson v. Thomas S. Whitney & Co. Ltd.* [1966] 1 W.L.R. 57.

[31] Earlier in *Hay (or Bourhill) v Young* Lord Macmillan propounded that reasonable care means the care that an ordinary skilful driver would have exercised under all the circumstances. At page 104 he indicated that, "*Proper care connotes avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on.*"

[32] In *Cecil Brown v Judith Green and Ideal Car Rental* after referring to section 51 (2) of the RTA and *Boss v Linton* [1832] 5 C & P 407 McDonald-Bishop J, (as she then was), stated at paragraph 34 that:

It is clear that there is indeed a common law duty as well as a statutory duty for motorists to exercise reasonable care while operating their motor vehicle on a road and to take all necessary steps to avoid an accident.

[33] Also in contemplation of *Boss v Linton* and section 51(2) of the RTA McDonald J similarly stated at paragraph 26 in *Jehoida Buchanan v Adrian Smith and Phyllis Hinds* that, "*Both common law and statute are applicable in determining the legal position of users on the road.*" Then at paragraph 27 McDonald J cited *Nance v British Columbia Electric NY* at page 611 where Viscount Simon speaking for the Judicial Committee of the Privy Council stated that:

Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle.

[34] It is clear from *Flower v Ebbw Vale Steel, Iron and Coal Co.* that it is for the defendant to prove the elements of contributory negligence. It is equally clear from *Ramon Burton (an infant by his father and next friend Wilburn Barton) and Wilburn Barton v John McAdam, Wesley McAdam, Lawrence Dennis and Dennis Clinton Wright* that if a defendant alleges negligence in the pleadings against another party, without providing any evidence of such negligence, that defence must fail.

#### DISCUSSION AND ANALYSIS

##### Issue 1 and 2

[35] It is convenient to deal with the first two issues together as the outcome on one necessarily will impact the outcome on the other. The analysis is perhaps best framed in the context of the facts that are not in issue. These are:

- i) Two (2) distinct collisions occurred on March 19, 2006, each of which involved two (2) vehicles;
- ii) The vehicles involved in the first collision was the taxi driven by Mr. Perkins and the ambulance driven by Mr. Dryden;
- iii) The second collision occurred shortly after the first and was between a station wagon that had been travelling behind the ambulance, and the taxi;
- iv) Ms Roach was a passenger in the taxi during both collisions;
- v) At the time of the collision with the taxi, Mr. Dryden was a servant and/or agent of the Government of Jamaica and drove the ambulance for the Ministry of Health;

vi) The collision occurred along the Twickenham Park main road in St. Catherine and all three vehicles involved in the two accidents were travelling towards Kingston from the direction of Spanish Town.

**[36]** The law is clear that in driving their respective motor vehicles, both Mr Dryden and Mr. Perkins owed each other and other users of the road a reciprocal general duty to take reasonable care to avoid causing damage to persons, vehicles and property. To exercise such reasonable care, each driver at all times had a duty to keep a proper look out for other traffic that might have been expected to be on the road, and to be aware of traffic that was or may have been expected to be in front of, behind or beside him.

**[37]** According to the claimant Mr. Perkins, he was travelling along the Twickenham Park main road and activated his indicator by the pedestrian crossing which was about 40 feet from the gas station, showing that he intended to turn right. He then slowed to 5 miles per hour and checked his rear view mirror, which allowed him at that time to see up to 30 feet behind him. He stated that nothing was coming from in front or behind him, although he acknowledged how busy a thoroughfare it is. From his account it was when he started to turn from close to the middle of the road, that he heard the loud screeching of what sounded like brakes and he looked and saw the ambulance. He indicated that he tried to straighten up to allow the ambulance to pass, but it was too late and the ambulance hit into the right back of his vehicle. He maintained he never saw any flashing lights. Ms. Roach substantially corroborated Mr. Perkins' account about when he activated his indicator and repeatedly observing him checking his rear view mirror as well as the taxi's position in the road, before he started to turn.

**[38]** Mr. Dryden on the other hand stated in his witness statement that he was travelling towards Kingston with his flashing lights on. However there is no indication that he had his siren blaring to alert other road users to the fact of an emergency. According to his account, he was overtaking the taxi when it turned suddenly to the right causing him to collide to the front right side of the taxi after

which, a second vehicle struck the taxi to the rear, pushing it into a ditch on the other side of the road.

- [39]** A critical point raised by counsel for the claimants relates to the inference that can be drawn from a finding of fact as to the point of impact of the ambulance on the taxi. It is clear that the evidence does not support a conclusion that the impact was to the front right side of the taxi as asserted by Mr. Dryden in his witness statement. Apart from the evidence given by Mr. Perkins and Ms. Roach that the collision was to the right back, the photographic evidence from the assessor's report supports the conclusion that the ambulance hit the taxi to the rear, before the taxi was once again hit to the rear by the station wagon. The photographic evidence does not support a collision to the front right side.
- [40]** Mr. Dryden said that the damage to the ambulance was to the left front section of the vehicle, resulting in damage to the left front door, bumper and fender as well as the radiator. He said that he swerved the ambulance further right in an effort to avoid the collision, a fact supported by where the ambulance rested after the collision in front of the Petcom Gas Station. On all the evidence I find on a balance of probabilities that the collision was between the left front section of the ambulance and the right rear section of the taxi.
- [41]** The significance of the point of impact is that counsel for the claimant submitted that such a finding would corroborate Mr. Perkins' version of the events and also show that no evidence had been put before the court that Mr. Dryden had complied with his duty under s. 51(2) of the RTA to take all reasonable steps to avoid the collision.
- [42]** The value of the point of impact to the determination of this matter however has to be weighed in the context of the other findings of fact that the court will make. Mr. Perkins said that he could see some 30 feet behind his taxi and had activated his indicator from 40 feet before getting to the gas station. The road way was dry, the day was clear and having checked the oncoming traffic and his rear view

mirror, no vehicles were coming from in front of, or from behind him. He said he decelerated to the pedestrian pace of 5 miles per hour and positioned himself near the middle of the road so that he could turn safely. Having given careful consideration to the account given by Mr. Perkins and supported in some material particulars by Ms. Roach, there are significant parts of the claimants' account that I do not accept. If in fact Mr. Perkins had activated his indicator from 40 feet away and checked his rear view mirror, being able to see 30 feet behind him up along the roadway, he would reasonably have seen the ambulance coming. Further, if in fact the taxi had slowed to 5 miles per hour, with indicator activated, it would have been a clear indication to the approaching ambulance that he was about to turn right.

**[43]** I accept as stated in Mr. Dryden's witness statement, that the taxi "*did not make any indication, whether with its indicator lights or otherwise, that it was going to turn.*" Mr. Perkins had a duty of care to all users of the road to keep a reasonable look out, which includes taking note of vehicles in front of, behind and alongside his vehicle, and to give a clear indication of his intention to turn. On Mr. Perkins' account there were no vehicles coming in the opposite direction at the relevant time, a factor which suggests that Mr. Dryden's way going forward would have been clear to overtake. I also accept that when Mr Dryden indicated to overtake the taxi, it "*suddenly turn to the right to enter the Petcom Gas Station.*" I find that it is evident that the ambulance was going faster than the taxi and the fact that Mr. Dryden opted to overtake at that point is more consistent with the taxi making a sudden turn to the right as he was about to pass the taxi, than with Mr Perkins having given adequate indication of his intention to turn, decelerated and positioned the taxi to turn; all actions that I find would likely have alerted Mr. Dryden to his intentions.

**[44]** I reject Mr. Perkins' evidence that he checked his rear view mirror as he indicated; as if he had done so, he would have been alerted to the presence of the ambulance behind him, prior to his hearing the screech of brakes just before the collision. I therefore do not find that he had a proper lookout for vehicles



behind him or beside him before turning right into the path of the ambulance that was overtaking. I also accept that the flashing lights of the ambulance were on. That is however not of significant moment, given that as I have found Mr. Perkins did not check his rear view mirror, he would not have seen the ambulance or its lights.

[45] What therefore is the court left with? While I did not find that Mr. Dryden's account of the collision being with the front right section of the taxi to be accurate, I do find that the collision to the right back of the taxi took place as he was overtaking the taxi on the right. This is consistent with both the claimants' and defendants' account that the accident happened as the ambulance was in the process of overtaking the taxi. I also do not find that the Defence gave materially different accounts of the sequence of events, as it was consistently maintained that the collision occurred as the ambulance was overtaking the taxi. It should also be noted that the only mention of which lanes the respective vehicles were travelling in was in the Defence filed August 21, 2008 and not in the Defence filed June 19, 2008 nor the statement of Mr. Dryden filed July 23, 2012. It is therefore not correct to say that there is any direct conflict that arises between the different documents. Further the court considers that the collision to the right rear section is actually explained by the action taken by Mr. Perkins after he became aware of the overtaking ambulance. He stated in his witness statement that:

I started to turn when I heard a loud screeching of what sounded like brakes. When I heard the noise, I looked and saw that it was an ambulance. **I tried to straighten up back to allow the ambulance to pass, but it was too late and the ambulance hit me in the back of my vehicle to the right of the back.** (Emphasis added).

[46] The action of Mr Perkins trying to "straighten up", (which I understand to be trying to turn back towards his left), does, I find, explain why the ambulance ended up hitting the right rear section and not the front right side of the taxi to which it may

have been heading. The effort of Mr. Dryden to avoid the collision is evident in the fact of his applying his brakes and swerving further right to avoid it, which in the view of the court, demonstrated his reasonable efforts to avoid the accident. Why Mr. Dryden got the point of impact wrong, I am unable to say definitively. However what I have found definitively is that Mr. Perkins' was negligent in acting as he did, and that he was the sole direct cause of the collision with the ambulance. But for his turning the vehicle to the right without indicating or checking his mirrors, on what he knew was a busy thoroughfare, the collision would not have occurred. Having found that Mr. Dryden took reasonable steps to avoid the accident, I do not find Mr. Dryden in any way liable for the collision that resulted. By necessary implication I also do not find the 2<sup>nd</sup> defendant vicariously liable.

**[47]** In light of my finding on issues 1 and 2, issues 3 to 5 and the evidence and relevant law germane to those issues, are no longer live for consideration.

**DISPOSITION**

**[48]** Based on the foregoing, I find for the defendants on both of these consolidated claims and accordingly give judgement for the defendants. Costs in both claims are awarded to the defendants to be agreed or taxed.